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Supreme Court of the United States

OCTOBER TERM 1935

No. 10

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

CITY BANK FARMERS TRUST COMPANY, as Trustee under agreement with Gertrude Feldman James, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

RUSSELL L. BRADFORD,
Counsel for Respondent.

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TO THE HONOURABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the City Bank Farmers Trust Company, as trustee under an agreement with Gertrude Feldman James, Deceased, the respondent in the above entitled cause, and respectfully presents its petition for a rehearing of the above cause, and, in support thereof, respectfully shows as follows:

The decision of this Court on November 11, 1935, we believe, charts a new course in the jurisprudence of death duty legislation of such vital importance, and the effect of

the decision is so far reaching, that we respectfully urge that a rehearing be granted for the following reasons:

(1) The statute does not in terms require that the power to alter, amend, or revoke, be one *reserved* to the settlor in the trust instrument in order to render, within the purview of this decision, the *inter vivos* transfer subject to the death tax. So far as the statute is concerned, the transfer is apparently within its terms if the power exist, whether by the terms of the instrument, or by virtue of a statute, or by common law. The statute, so far as pertinent, is as follows:

> "To the extent of any interest therein of which the donor has at any time made a transfer, by trust or otherwise, *where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power,* either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *" [Italics ours.]

The decision of this Court will possibly carry with it the right to tax every *inter vivos* gift under the Federal estate tax (as well as the Gift tax) if the gift take the form of a trust, and particularly if all the parties interested therein be adults.

If it be suggested that the statute would not apply to an *inter vivos* gift which may be revoked with the consent of all of the interested parties (where the indenture does not mention such a power) then the statute is not so clear that it is not open to construction. A trust revocable with the consent of all the parties interested by virtue of statute, or state law, is no more complete, so far as the settlor is concerned, than the trust in suit.

If the statute then is open to construction, it should not be construed so as to apply to an absolute transfer, nor to a transfer alterable or revocable only with the consent of an interest in law deemed adverse thereto, for it is equally

absolute to that extent at least. In fact the statute impliedly has been open to construction since its enactment. The very form on which the return is made so indicates. The language of the questionnaire on Form 706 is as follows:

> "Schedule E. (6). Did the decedent, at the time of his death, possess the right (either alone or in conjunction with any person *other than the beneficiary of the transfer*), to change through the exercise of a power to alter, amend, or revoke the transfer of any property previously made by him? (Answer 'Yes' or 'No') ————." [Italics ours.]

If the statute be open to construction, then we suggest we are dealing with a tax upon *transfers* (that is an estate tax), and not one upon the right to receive. We must look to the power or ability of the settlor to alter or revoke. If she have not that power except with the consent of the adverse interested parties (whether given to her in terms, by statute, or by the common law), then there is nothing over which she has the control of the disposition, and no ownership in property that moves from her at death. To the extent of the adverse interest—at least—the beneficiary or adverse interest is the absolute owner. Mere forms or titles do not add to nor detract from the completeness of the transfer or the rights of the adverse interest. Compare *Burnet* v. *Guggenheim* (288 U. S. 280, at p. 283), where this Court said:

> "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid."

See also the footnote on page 283.

(2) If the Committee Reports may not be referred to, and the statute is not subject to any construction, then as above stated the statute applies whether or not the power be

reserved in the trust instrument, if it be in existence as a matter of law at the time of the death of the settlor. However, there is nothing in the Committee Reports concerning Section 302(d) that suggests that that section was inserted into the law solely to prevent evasion or avoidance of the tax.

When the 1918 Act was enacted new items of taxability were added, not solely for the purpose of preventing evasions, but to broaden the tax base—the things made thus taxable being deemed appropriate to death taxes within the purview of *Knowlton* v. *Moore* (178 U. S. 41), such as dower and courtesy; insurance over $40,000; and the exercise of general powers of appointment.

The 1921 Act added no further items of taxability.

At the time the 1924 Act was enacted it was thought, because of the decisions with respect to the New York transfer tax (see *Matter of Carnegie,* 203 App. Div. 91 [1922], aff'd 236 N. Y. 517 [1923]; *Matter of Cochrane,* 117 Misc. 18 [1921], aff'd 202 App. Div. 751 [1922]; *Matter of Miller,* 236 N. Y. 290 [July, 1923]; *Matter of Bowers,* 195 App. Div. 548 [1921], aff'd 231 N. Y. 613 [1921]), and the inheritance taxes of Pennsylvania (*Dolan's Estate,* 279 Pa. St. 582 [March 10, 1924]), and Illinois (*People* v. *Northern Trust Co.,* 289 Ill. 475 [1919]; *People* v. *Kelley,* 218 Ill. 509 [1905]), that trusts subject to a power of revocation, unless the grantor also reserved the income, were not subject to the Federal estate tax (cf. *Matter of Schmidlapp,* 236 N. Y. 278 [1923]); and *a fortiori* so where the power was restrained by the necessity for the consent of another —whether trustee or stranger to the property interests (compare *Matter of Bowers, supra,* and *Hill* v. *Nichols,* 18 F. (2d) 139, Dist. Court, Mass., March, 1927—not appealed).

On July 6, 1923, the Internal Revenue Bureau amended the Regulations issued under the 1921 Act (Reg. 63, Art. 21) so as to leave it a matter of proof as to intention whether or not a transfer subject to a power of revocat[illegible]vas taxable as a transfer intended to take effect in pos[illegible]ssion or

enjoyment at or after death within the purview of Section 402(c) of the 1921 Act.*

It was in the light of this background, we believe, that Section 302(d) was enacted, and added to the taxable items set out in Section 302 of the Revenue Act of 1924, and reenacted in the 1926 Act, for at the time of the enactment of the 1924 Act revocable trusts were not considered *ipso facto* taxable under Section 402(c) of 1921 Act or Section 302(c) of the 1924 Act.

(3) The statute as construed in the decision of this case will subject such gifts not only to the gift tax (see Section 501 of 1932 Act; Reg. 79, Art. 3, and see p. 283, together with footnote in *Burnet* v. *Guggenheim*, supra), but also to the Federal estate tax. In addition to that, if a trust be revoked with the consent of the adverse interest, it is submitted that the Treasury Department will demand a gift tax upon the value of the adverse interest so consenting to revocation to the extent of the value of such adverse interest, on the ground that it constitutes a gift from the beneficiary *to* the original donor. We think this is obvious. The result is that at least under the Gift tax law consent to revocation by an adverse interest may be deemed a gift back.

(4) With deference it is submitted that in this case it was not argued in this Court by counsel that Section 302(d) should be construed in the light of Section 219(g) (Income

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* Prentice Hall Inheritance Tax Service for 1923-1924 at p. 323:

"Art. 21. (As amended by T. D. 3487, dated June 6, 1923). Reservation of powers.—Where a transfer by trust or otherwise is subject to revocation by the donor, or the terms thereof may be altered or amended by him, or he reserves to himself the right to take or assume either full or partial control of the transferred property, or to direct or control the management thereof, all facts and circumstances bearing upon the donor's intent are to be considered, and if it appears that he intended the transfer to take effect in possession or enjoyment at or after his death, then the value of the transferred property should be included in the gross estate, unless it further appears that the transfer was a bona fide sale for a fair consideration in money or money's worth."

Tax provision), as suggested in the opinion. Early in the study of this case it was recognized that Section 219(g) had to do with revesting the corpus in the grantor, while Section 302(d) was wider and had to do also with any change or alteration in the beneficial enjoyment, independently of the right to revest title to the corpus. Because of this recognition counsel studiously avoided making the argument made by other counsel with respect to this point. The argument of the respondent in the case in suit was directed to the point that the settlor being helpless to make the change or alteration, the statute was not applicable, (1), because the words "any person" should not be given a construction that raised grave constitutional questions when another construction was possible; and, (2), because the decisions of this Court seemed to respondent fairly definitely to point to the construction that "any person" excluded a donee or other beneficial interest as the only permissible practical one in view of *Reinecke* v. *Northern Trust Co.* (278 U. S. 339), *Heiner* v. *Donnan* (285 U. S. 312); and also *Witherbee* v. *Helvering*, (70 F. [2d] 696, certiorari denied 293 U. S. 582).

(5) The respondent takes the liberty of calling the attention of the Court to the fact that the opinion states that after the death of the husband-beneficiary, Samuel James, the trust could be revoked, altered or amended with the consent of the trustee and *her* (the settlor's) brother. The provision of the trust (paragraph 12, R. 7) was that consent of Samuel James' brother (Frank Samuel James), not *her* brother, was required. The significance of this lies in the fact that the husband *and his family* (not the settlor's) were the controlling powers in any revocation or alteration of the trust.**

** Attention is also called to the statement in the opinion that Mrs. Gertrude Feldman James was a nonresident citizen of the United States. The record shows only that she was a nonresident (see petition, R. 2; answer, R. 10; stipulation of facts, R. 11)—not that she was a citizen. In fact (outside of the record) the information in the hands of the trustee shows that she was a British subject, the wife of a retired lender of money in London, who also was a British subject.

(6) Trusts of the character here referred to do not now escape taxation. At the same time that Section 302(d) was inserted in the Revenue Act of 1924, the Congress adopted a gift tax law. (It again did so in the Revenue Act of 1932.) We submit that one of the purposes was to impose a gift tax on this class of trusts, and the estate tax law was intended to apply to revocable trusts, or transfers over which the donor had the power of disposition at his death. The present gift tax law specifically imposes a tax upon this class of trusts (see Sec. 501(c) Rev. Act of 1932; cf. *Burnet* v. *Guggenheim*, supra, p. 283; see 1934 Act and Committee Reports set out on p. 15 of our main brief). While, as we contend, this trust may not be subject to the Federal estate tax, by the very same token, and because of this fact, it would be subject to the Federal gift tax if now made. The latter because it is deemed a complete transfer at the time of the creation of the trust, as this Court held in this case. It follows, we submit, if it be taxable as a gift because a complete transfer, that it should not be subject to a Federal estate tax as a transfer at death or as a transfer to be assimilated to death (as in the case of gifts in contemplation of death) because the association with death from which "the power to tax takes its being" (*Knowlton* v. *Moore*, 178 U. S. 41 at p. 56) is too remote. That nothing passes at death which had not already passed upon the effective creation of the trust is recognized in the opinion; as likewise it must be conceded that nothing accrues to the adverse interest that was not already indefeasibly owned by it (cf. *May* v. *Heiner*, 281 U. S. 238).

(7) With deep respect, but with equally deep earnestness, we urge that it is inconceivable to us that the operation of the statute is not as oppressive and harsh as the section declared unconstitutional in *Heiner* v. *Donnan*. Both are transfers "begun and completed wholly by and between the living," not made in contemplation of death. And if completed prior to death (as this Court said), we

believe Congress may not assimilate to the estate as a part thereof something which is not a part, and on the aggregate impose a graduated tax. That the transfers were complete is settled as above stated by decisions of this Court, and that the assets of the trust are not a part of the estate is obvious.

In *Heiner* v. *Donnan*, supra, at p. 322, this Court said:

> "The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. *Milliken* v. *United States*, 283 U. S. 15, 23. But such a transfer, *not so made*, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v. *McCaughn*, 280 U. S. 124), but *obviously not subject to any form of death duty*, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, *which is the subject of a death tax*, [citing cases]; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. (Cf. *Tyler* v. *United States*, 281 U. S. 497, 503). Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other in consequence of death which happens afterward." [Italics ours.]

So far as the power of the donor is concerned, all of these things are true in the case in suit. They are equally true so far as the rights of the adverse beneficial interest are concerned of Samuel James, the husband.

If the transfer is complete then nothing is retained to the settlor—unless it be a power of disposition over the property (as in *Porter* v. *Commissioner*, 288 U. S. 436). But this the settlor here did not have—certainly to the extent of the adverse interest. If the theory upon which the validity of the statute is upheld be the possible avoidance or evasion of the tax (and the Congress so intended) the theory must emerge from the conception that something of substance was reserved to the settlor or remained in her which would be subject to the death duty as a part of her estate. *Non constat* if nothing of substance be in her, nothing of substance in taxes is avoided. If a donor make an absolute gift (not in fact in contemplation of death) nothing remains in the donor that can justify a death tax upon the death of the settlor. From this concept it follows that if the donor has completed his gift, and has no power of disposition or alteration of the beneficial enjoyment in substance—factually—then there remains nothing upon which the death tax can fasten. The postulate that the power to alter or revoke does not exist so far as the adverse interest is concerned does not beg the question,—unless it be decided that all gifts to adults are amenable to the statute because the adult donee may consent to a re-taking of the property or revocation or change in the transfer. Once this is held, the holding in *Heiner* v. *Donnan* would for practical purposes be brushed aside, and all gifts (or at least most) would feel not only the axe of the gift tax, but also the scythe of the death duty.

All gifts avoid or evade the death tax in the sense that so much is not at death a part of the estate or property of the decedent. And the gift tax was enacted to catch such transfers. It has been generally believed, however, that absolute gifts are not amenable to the death tax unless made in contemplation of death. The decision herein, if carried to its logical and natural conclusion, would at the very least mean that an absolute gift in trust would not be taxable if some of the parties in interest were minors or

unable to consent, but that an equally absolute gift in trust would be taxable if all the parties in interest were adults and able to consent, even though the indenture of transfer contained no provision for alteration or revocation (see Section 23, N. Y. Personal Property Law; and Restatement of the Law of Trusts, Sec. 338). In other words, the words "any person" will apply to adults capable of consenting, but not to minors or those unable to consent. The distinction, we believe, is illusory and unreal, and the classification without a basis in substance and actuality.

We respectfully urge the above vital considerations, and respectfully petition for a rehearing.

CITY BANK FARMERS TRUST COMPANY
as Trustee under an agreement with
Gertrude Feldman James, Deceased,
By RUSSELL L. BRADFORD,
Its Attorney.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

RUSSELL L. BRADFORD.

November 29, 1935.